The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BAO XUYEN LE, as Personal Representative of the Estate of TOMMY LE; HOAI "SUNNY" LE; and DIEU HO, Plaintiffs, vs. REVEREND DR. MARTIN LUTHER KING JR. COUNTY; and KING COUNTY DEPUTY SHERIFF CESAR MOLINA, Defendants.	No. 2:18-CV-00055-TSZ DEFENDANT KING COUNTY'S MOTION FOR SUMMARY JUDGMENT ***Noted for: March 5, 2021***

I. RELIEF REQUESTED

With discovery closed and trial approaching, a number of issues must be determined as a matter of law in order to focus these proceedings. Plaintiffs, who have the burden of proof at trial, have failed to establish the factual record necessary to sustain their claims as a matter of law. Plaintiffs' newly asserted state law claims should be dismissed under Washington's felony bar statute, RCW 4.24.420. Because this Court dismissed Plaintiffs' previous state law claims outright, it has yet to rule on the felony bar issue. *See* Dkt. 148 (Minute Order at 1). Plaintiffs also lack colorable proof of negligence or causation. Moreover, Plaintiffs have failed in their

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burden and promise to establish the facts necessary for King County's *Monell* liability under a ratification theory. For these reasons and those stated below, the Court should grant summary judgment dismissing Plaintiffs' state law claims and its 42 U.S.C. § 1983 claim against King County.[1]

II. STATEMENT OF FACTS

A. FACTS MATERIAL TO MOTION

On June 13, 2017, just before midnight, King County 911 dispatch received calls from two civilians, Zachry Schwiethale and Kevin Hernandez, who reported that they had each been chased and threatened by a man with a knife, later identified as Tommy Le. Declaration of Daniel L. Kinerk (Kinerk Decl.), Exh. 1; Exh. 2, 10:21-25 – 11:1-3, 24:10-22, 27:23-25, 28:1-17, 32:3-5, 33:7-25; Ex. 3; Ex. 4; Ex. 5, 2:6-16; Ex. 6, 36:18-25 – 37:1-8, 42:3-10, 43:15-19, 47:14-25. When police responded a few minutes later, Le appeared on the scene. Kinerk Decl., Exh. 6, 57:13-25 – 58:1-14; Exh. 7, p. 4. Deputy Cesar Molina attempted to talk to Le, "Hey, can we talk to you? We want to talk to you." Kinerk Decl., Ex. 6, 58:15-25 – 59:1. The deputies asked Le to show his hands but he kept walking toward them. Kinerk Decl., Exh. 2, 50:18-23; Exh. 6, 59:11-14. Le did not stop nor show his hands. Kinerk Decl., Exh. 2, 50:8-11. Hernandez warned the deputies, "he has a knife, he has a knife." Kinerk Decl, Exh. 7, p. 4. Deputies Molina and Owens Tased Le. Kinerk Decl, Exh. 2, 50:24-25 – 51:1-9; Ex. 6, 59:22-24, 60:15-19; Exh. 8, p. 3-4. But Le continued to advance. Kinerk Decl, Exh. 6, 59:22-24. Ultimately, as Le moved to within 3-5 feet of Deputy Molina and towards Deputy Paul and the civilian witnesses, Deputy

[1] King County understands that Deputy Molina is also joining in the County's felony bar arguments.

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Molina fired his weapon, killing Le. Dkt. 108, p. 16 (Plaintiff's Opposition to Defendants' Motions for Summary Judgment).

Other facts will be discussed below as relevant to the arguments.

B. PROCEDURAL HISTORY

Plaintiffs originally asserted four state law claims against King County and Deputy Molina. Dkt. 17. King County and Deputy Molina moved for summary judgment on March 29, 2019 and, on April 26, 2019, this Court granted the defendants' summary judgment motion on the state law claims. Dkts. 78, 148.

On May 16, 2019, the court heard oral argument on the question of municipal liability under the *Monell* standards, among other things. In a subsequent minute order, the court denied summary judgment on the *Monell* issues due to an unspecified material issue of fact:

> King County's motion for summary judgment is otherwise DENIED. Having reviewed the entire transcript of the Rule 30(b)(6) deposition of Chief Lisa Mulligan, docket no. 175-1, the certification signed by Erin Overbey, Legal Advisor for the King County Sheriff's Office, docket no. 176, and the other materials presented by the parties, and having considered the oral arguments of counsel at the hearing on May 16, 2019, the Court CONCLUDES that genuine disputes of material fact preclude summary judgment with respect to whether King County may be held liable pursuant to *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978), and its progeny. *See* Fed. R. Civ. P. 56(a).

Dkt. 178 at 1.

On December 2, 2019, this Court permitted plaintiffs to reassert a state law negligence claim due to the Washington Supreme Court's opinion in *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 442 P.3d 608 (2019). Dkt. 221. Plaintiffs subsequently filed their 2nd Corrected Third Amended Complaint on August 14, 2020 pleading common law negligence against the defendants for "negligently causing foreseeable harm in the course of Officer Molina's law enforcement interaction that caused the death of Tommy Le." Dkt. 234.

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III. STATEMENT OF ISSUE

1. Should plaintiffs' state law claim against King County be dismissed under vicarious liability principles when their claims against Deputy Molina and other deputies are barred by RCW 4.24.420 and all of the deputies were acting within the course and scope of their employment?

2. Should plaintiffs' state law claim against King County be dismissed when plaintiffs have failed to prove negligence and causation due to negligence by deputies that caused Le's death?

3. Should plaintiffs' §1983 claims against King County be dismissed when the evidence demonstrates that no elected Sheriff ratified Deputy Molina's actions?

IV. EVIDENCE RELIED UPON

King County's Motion for Summary Judgment is based on the following evidence:

1. Declaration of Daniel L. Kinerk, with exhibits;

2. Declaration of Mitzi Johanknecht, with exhibit; and

3. The pleadings on file with this Court.

V. AUTHORITY AND ARGUMENT

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. Fed. R. Civ. P. 56. Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to present, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Cotrett*, 477 U.S. 317, 324,106 S. Ct. 2548, 91 L.Ed.2d 265 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir.1995). Factual disputes whose resolution would not affect the outcome of the suit are

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irrelevant to the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). In other words, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable [fact finder] could return a [decision] in its favor." *Triton Energy*, 68 F.3d at 1220.

A. PLAINTIFFS' STATE LAW CLAIM OF NEGLIGENCE AGAINST KING COUNTY MUST BE DISMISSED PURSUANT TO RCW 4.24.420 BECAUSE LE WAS IN THE COURSE OF COMMITTING MULTIPLE FELONIES AT THE TIME HE WAS SHOT.

Plaintiffs' state law claim of common law negligence against King County should be dismissed pursuant to RCW 4.24.420 because Le was in the course of committing multiple felonies at the time he was shot and his commission of those felonies was the proximate cause of his death. Because Deputy Molina and the other deputies were acting in the course and scope of their employment at the time of their use of force, their statutory immunity pursuant to RCW 4.24.420 extends to defendant King County under vicarious liability principles.

Known as the felony bar statute, RCW 4.24.420 provides a complete defense to liability against all state law claims:

> It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death.

The Legislature's intent in enacting the felony bar statute was to enact tort reform in an environment where counties were faced with increased exposure to lawsuits, resulting in higher taxes to its citizens:

> The purpose of this chapter is to enact further reforms in order to create a more equitable distribution of the cost and risk of injury and increase the availability and affordability of insurance. . . . The legislature finds that counties, cities, and other governmental entities are faced with increased exposure to lawsuits and awards and dramatic increases in the cost of insurance coverage. These escalating costs ultimately affect the public through

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> high taxes, loss of essential services, and loss of the protection provided by adequate insurance.

1986 WA Laws, ch. 305, §100. The commission of a felony constitutes an absolute bar to liability for state law causes of action. *See Estate of Lee ex rel. Lee v. City of Spokane*, 101 Wn. App. 158, 178, 2 P.3d 979 (2000) (dismissing action).

Under the facts of this case, King County Deputies were called to the scene because Le was in the course of committing multiple felonies. The reports of Le's actions toward his neighbors constituted felony assault. Washington law recognizes three definitions of assault:

> (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm.

State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). A person commits the crime of assault in the second degree when he "assaults another with a deadly weapon." RCW 9A.36.021(1)(c). A person commits the crime of assault in the third degree when he "assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g).

When the deputies arrived on the scene, Le had already assaulted Schwiethale and Hernandez with a knife or screwdriver by putting each of them in reasonable apprehension of harm. Indeed, Hernandez was so fearful of Le's actions that he fired his gun. When Le approached the intersection shortly after deputies had arrived and were interviewing the civilian witnesses, Le was *continuing* his ongoing assault against Schwiethale and Hernandez by "walking aggressively" toward them, and not responding to police commands to stop. At the same time, Le's movements toward the deputies and the civilians behind them further escalated the scene. The report by Hernandez, warning deputies, "he has a knife, he has a knife" (Kinerk Decl, Exh. 7, p. 4), demonstrates continued and reasonable apprehension of harm. Some on the

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scene reported seeing an object in Le's clenched hand. Le responded to neither commands nor Taser. Deputy Molina was sufficiently concerned about his own safety and the safety of others that he fired his service weapon, thereby killing Mr. Le.

Although it turns out that Le was not actually holding a weapon, it is reasonable to infer his intent to "create reasonable apprehension" in others by the way he acted. When Le threatened Schwiethale and Hernandez with a knife or screwdriver and came at Deputies Molina, Owens and Paul with an apparent object in his hands, hands clenched as though holding a weapon, there is no *genuine* issue of material fact as to whether he intended to create a reasonable apprehension of harm to others. Unlike *Davis v. King County*, 2021 WL 321659, ___ Wn. App. 2d ____ (2021), there is no evidence to refute this inference of assault. Le was not struggling with any mental health or suicidal ideation issues. Dkt. 133, Ex. B, p. 5. The more likely explanation is Le was under the influence of LSD. Dkt. 133, Ex. B, p. 5. In the present case, viewing the facts in the light most favorable to plaintiffs, at the time Le was shot, he was assaulting Zachry Schwiethale and Kevin Hernandez, as well as Deputies Molina, Owens, and Paul, by putting them in *apprehension of harm* – one of the legal definitions of assault. For Schwiethale and Hernandez, because Le had a knife or other sharp object, it was assault in the second degree (assault with a deadly weapon). For Deputies Molina and Owens, because they were law enforcement officers, it was assault in the third degree. All of the crimes being committed by Le were felonies.

But for Le's actions of assaulting the civilians and the deputies, he would not have been shot. Therefore, his felony assaults were the proximate cause of him getting shot.

The language of RCW 4.24.420 is clear: if a person is committing a felony then they cannot later seek civil damages under state law. As a result, this Court should dismiss plaintiffs'

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state law claim of negligence because Le was committing felonies at the time he was shot and the commission of those felonies was the proximate cause of his death.

B. PLAINTIFFS' STATE LAW CLAIM OF NEGLIGENCE SHOULD BE DISMISSED.

Plaintiffs' negligence claim should be dismissed because they have not alleged negligence by King County deputies that directly led to Le's death. In the present case, King County deputies were responding to an emergent situation in which Le had assaulted civilians and continued his assaultive behavior by moving aggressively toward deputies and civilians. Unlike recent cases in which deputies voluntarily engaged in actions, such as a search warrant or surveillance to arrest a suspect, the King County deputies in this case were forced to respond in just 105 seconds to Le, who would not stop and appeared armed with a weapon. Furthermore, plaintiffs have failed to show that had deputies acted differently, that the outcome would have been any different.

To "prevail on a negligence claim, a plaintiff 'must show (1) the existence of a duty to plaintiff, (2) a breach of that duty, (3) a resulting injury, and (4) the breach as the proximate cause of the injury." *Mancini v. City of Tacoma*, 2021 WL 279715, ___ P.3d ____ , ¶ 32 (1/28/21)(quoting *Ehrhart v. King County*, 195 Wn.2d 388, 396, 460 P.3d 612 (2020)). In the context of law enforcement, the common law duty "encompasses the duty to refrain from directly causing harm to another through affirmative acts of misfeasance." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 550, 442 P.3d 608 (2019).

If an officer does act, "the officer has a duty to act with reasonable care." *Id.* at 551 (citing *Coffel v. Clallam County*, 47 Wn. App. 397, 735 P.2d 686 (1987). In *Beltran-Serrano*, an officer encountered a mentally ill homeless man and the "simple social contact" escalated to use of deadly force. *Beltran-Serrano*, 193 Wn.2d at 540. The court held that because the officer had

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direct contact with Beltran-Serrano and the officer's affirmative actions led to the deadly force, that Beltran-Serrano's claims of negligence could survive a summary judgment motion. *Id.* at 551-52.

In *Mancini, supra*, the police served a search warrant at the wrong apartment based on misinformation from a confidential informant. *Mancini*, 2021 WL 279715, at ¶ 3-10. The Washington Supreme Court held that police executing a search warrant owe the same duty of reasonable care that they owe when discharging other duties. *Id.* at ¶ 35. In *Mancini*, plaintiff alleged that the police actions leading up to the search warrant fell below a reasonable standard of care because the police failed to conduct surveillance at the apartment and do a controlled buy, which were steps usually taken to ensure they had the correct apartment before executing a search warrant. *Id.* at ¶ 5. In support of their holding, the *Mancini* court cited numerous cases in which the police acted negligently in carrying out their duties: failure to release the wrong suspect, negligent emergency response, negligent high-speed chase in pursuit of suspect. *Mancini*, n.8.

Beltran-Serrano, *Mancini*, and the duty of care cases cited within those opinions involve alleged negligence in *affirmative* acts by police carrying out their duties that led to injury to a plaintiff. In *Beltran-Serrano,* the police officer approached a homeless man sitting on the street, not committing any crime. In *Mancini*, the police served a search warrant in the home of an innocent person. In both cases, the police were able to control the timing of their actions and when to act.

Similarly, in a recent decision by this Court, *Briscoe v. City of Seattle*, 2020 WL 5203588 (W.D. Wash. Sept 1, 2020), police were conducting a surveillance operation at a residence. *Id.* at ¶ 2. Police observed a convicted felon, Che Taylor, enter the house. *Id.* Police observed a

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black handgun in a holster on Taylor's right hip. *Id.* A decision was made to arrest Taylor when he came out of the house. *Id.* However, when Taylor exited, police lost sight of him and he was able to leave. *Id.* Sometime later, while police were still at the location, a car arrived back at the house and Taylor exited the car. *Id.* Police then moved in to arrest Taylor and Taylor was shot and killed when, according to the officers, Taylor did not show his hands and appeared to be going for a weapon. *Id.* at ¶ 2-3.

In denying a motion for summary judgment on the negligence claims in *Briscoe*, this Court noted that "a plaintiff may not base a claim of negligence on an intentional act, like the use of excessive force, but may sue for negligent acts leading up to the ultimate use of force." *Id.* at n. 15 (citing *Beltran-Serrano, supra).* This Court then listed the deficiencies alleged by plaintiff in the police department's "handling of matter immediately before Taylor was shot." *Id.*

In the present case, unlike *Beltran-Serrano*, *Mancini*, and *Briscoe*, the police were *responding* to an emergent situation where a violent crime had been and was still being committed. The police were not able to prepare or set up their response because an armed man had assaulted citizens and was refusing to stop and was aggressively approaching the police and civilians. The entire encounter with police lasted 105 seconds.

No court has directly addressed the standard of care for police use of deadly force, but it is set out and defined in statute. RCW 9A.16.040 governs the use of deadly force by police in this type of situation:

> (1) Homicide or the use of deadly force is justifiable in the following cases:
>
> . . .
>
> (c) When necessarily used by a peace officer meeting the good faith standard of this section or person acting under the officer's command and in the officer's aid:
> (i) To arrest or apprehend a person who the officer reasonably believes has committed, has attempted to commit, is committing, or is attempting to commit a felony;

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RCW 9A.16.040(1)(c). By this statute, the "necessarily used" duty of care owed by police is expressly modified by the "good faith standard" in subsection (4) of the same statute:

(4) A peace officer shall not be held criminally liable for using deadly force in *good faith*, where *"good faith" is an objective standard which shall consider all the facts, circumstances, and information known to the officer at the time to determine whether a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to the officer or another individual.* RCW 9A.16.040(4)(emphasis added).

Thus, in order for plaintiffs' negligence claims to proceed, they must allege deficiencies in how the police handled the situation immediately before Le was shot applying the standard as set forth by RCW 9A.16.040. In other words, deficiencies in the 105 seconds deputies had to deal with Le advancing on them and the civilians with what they believed was a weapon in his clenched fists. The deputies asked Le to stop, show his hands, and drop his weapon, and he ignored them. Deputies Owens and Molina then Tased Le and Le continued to move aggressively toward them and the civilians. At that point, Le was shot. Under all the facts, circumstances, and information known to these officers, plaintiffs have presented no proof that officers violated the "good faith" standard of care in using deadly force, which necessarily causes their negligence claim to fail as a matter of law.

The deficiencies alleged in *Briscoe*, that this Court held were enough to allow the negligence claims to proceed to trial, simply did not exist in this situation where police were responding to a rapidly unfolding situation with an armed man advancing on them. Moreover, *Briscoe* does not indicate that the statutory standard of care in deadly force cases was brought to

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the court's attention. Absent proof under the statutory standard, Plaintiffs have failed to allege negligence that can proceed to trial.

Furthermore, not only do plaintiffs have to allege viable claims of negligence, but they have to establish cause - that "but for" the alleged negligence, the injury would not have occurred. In the present case, plaintiffs have failed to establish that any different actions by the police would have resulted in a different outcome. For example, plaintiffs have no evidence that if the deputies had talked more softly to Le that he would have stopped his advance or complied with the deputies' directions. Plaintiffs also have not established that if Deputy Molina had used force other than a gun, that Le would have stopped and not been killed, or that the deputies had an obligation to risk bodily injury by going "hands on" with Le after being warned of a knife. Only a few minutes earlier, Le had been undeterred when Kevin Hernandez had fired a gun at his feet, continuing to chase Hernandez into his home. There is no evidence to support that "but for" the actions of the deputies that Le would not have been shot.

Plaintiffs have failed to establish a genuine issue of fact regarding negligence to allow the claim to proceed to trial and this Court should dismiss plaintiff's state law negligence claim. On all of these matters, plaintiffs have the burden of proof and must present that proof to avoid summary judgment.

C. PLAINTIFFS' RATIFICATION THEORY FAILS BECAUSE NO ELECTED SHERIFF EVER APPROVED THE FINDINGS OF THE USE OF FORCE BOARD.

Although this court denied a prior summary judgment motion on King County's *Monell* liability based on unspecified material issues of fact, recent developments in case law and the completion of discovery merit judgment as a matter of law on this issue. Rather than waste valuable trial time presenting testimony, a liability theory that should be dismissed through a

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half-time motion, King County respectfully requests a ruling dismissing plaintiffs' *Monell* claims under Rule 56 because there are currently no material issues of fact and dismissal of this claim is appropriate as a matter of law. A second summary judgment motion brought "months later" and "prior to the dispositive motions deadline . . . is timely and is properly filed under this district's local rules." *Jinni Tech Ltd. v. Red.com, Inc.*, C17-0217JLR, 2020 WL 5095458, at *3 (W.D. Wash. Aug. 28, 2020).

In response to King County's previous *Monell* motion, plaintiffs indicated that their *Monell* claims were predicated on a ratification theory because Deputy Molina's actions were supposedly "ratified" by the King County Sheriff. Dkt. 108 (Pls's Opposition at 71-74). Plaintiffs made no effort to present actual evidence of the elected Sheriff's approval, claiming instead that "[t]he Sheriff has therefore given final approval as required by GOM 6.03.030(1) ***by default***." *Id.* at 73 (emphasis added). Although it was Plaintiffs' burden to present affirmative evidence of ratification, there was no evidence in the record when this court denied summary judgment affirmatively demonstrating that either former Sheriff John Urquhart or Sheriff Johanknecht ratified anything.[2] Plaintiffs have made no further effort to develop evidence that would satisfy their burden of proof to demonstrate ratification at trial. The statements of former Sheriff Urquhart, along with the Declaration of Sheriff Johanknecht, exceeds King County's summary judgment burden by showing that no elected Sheriff ratified Deputy Molina's actions or approved the Board's findings.

In the recent case of *Estate of Wangsheng Leng by & through Liping Yang v. City of Issaquah*, C19-490 TSZ, 2020 WL 7398749, at *5 (W.D. Wash. Dec. 17, 2020), this Court

[2] At the court's request, King County provided factual responses to three questions posed by the court. Dkt. 176. These responses do not state whether the Sheriff concurred or did not concur with the Use of Force Board ("Board") findings. *Id.*

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focused the inquiry necessary for a successful ratification claim. In order to satisfy *Monell*, the evidence must demonstrate a "conscious, affirmative choice" to approve the officer's conduct:

> In the absence of a 'conscious, affirmative choice' to approve Lucht's and Whittom's actions on the part of the IPD and/or the City of Issaquah, plaintiff cannot establish ratification. *See Johnson v. Shasta County*, 83 F. Supp. 3d 918, 933 (E.D. Cal. 2015) (quoting *Gillette v. Delmore*, 979 F.2d 1342, 1347 (9th Cir. 1992)); *see also Christie v. Iopa*, 176 F.3d 1231, 1239 (9th Cir. 1999) ("a policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval").

Id. at *6. There was no ratification in *Leng* as a matter of law because the municipality had not "officially exonerated" either officer. *Id.* Plaintiffs' claims of ratification "by default" fall far short of this "conscious, affirmative choice" standard and therefore fail as a matter of law.

As in *Leng*, there is no evidence that the official policy maker for the King County Sheriff's Office ("KCSO"), which was the elected Sheriff, formally approved Deputy Molina's actions.[3] Certainly, plaintiffs admit that former Sheriff Urquhart did nothing to ratify Deputy Molina's actions. Dkt.108 (Pls' Ops. at 72). Plaintiffs claim that Sheriff Urquhart stated that it was not necessary for Deputy Molina to shoot Tommy, and that he should have "wrestled Tommy to the ground and taken the plastic pen from his hand." *Id.* These statements, submitted by Plaintiff, actually defeat their own ratification claim. At the time of the incident, Sheriff Urquhart was the official policymaker and he apparently did not approve of Deputy Molina's actions.

Sheriff Johanknecht, who was the final policy maker by the time the Use of Force Review Board ("Board") issued its findings, took no action to ratify the Board's decisions or Deputy Molina's actions; she made no "conscious, affirmative choice." Sheriff Johanknecht

[3] The adoption of various amendments to the King County Charter in November 2020 alter the status of the elected Sheriff as the final policy maker for KCSO. Charter Amendment 5 makes the Sheriff an appointed position and Charter Amendment 6 allows the County Council to determine the duties of the Sheriff by ordinance.

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points out that she was aware of the Board's decision and "reviewed" the memorandum, but took no further actions except to inform deputies in the Sheriff's of the Board's findings. (Johanknecht Decl. at 7). Although the Sheriff had the option of either signing the Board's memorandum or sending it back for further review, the Sheriff "did not do either of these things with the Use of Force Review Board memorandum in the Tommy Le incident." *Id.* at 9. Thus, the Sheriff never formally signed off, approved, or ratified the Use of Force Review Board memorandum reviewing the Le shooting.

In the face of this affirmative evidence, Plaintiffs' claim of "ratification by default" fails as a matter of law. In the *Christie* decision cited in *Leng*, the Ninth Circuit pointed out that a plaintiff claiming ratification "must prove that the 'authorized policymakers approve[d] a subordinate's decision and the basis for it.'" *Christie*, 176 F.3d at 1239 (*quoting* City of St. Louis v. *Praprotnik*, 485 U.S. 112, 127 (1988) (plurality)). Sheriff Johanknect's actions in neither approving or disapproving of the Board's findings does not constitute ratification because "it is well-settled that a policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval." *Id. See also Weisbuch v. County of Los Angeles*, 119 F.3d 778, 781 (9th Cir.1997) ("To hold cities liable under section 1983 whenever policymakers fail to overrule the unconstitutional discretionary acts of subordinates would simply smuggle *respondeat superior* liability into section 1983."). In short, ratification cannot occur "by default," but requires evidence that the policymaker "made a deliberate choice to endorse" the subordinate employee's actions. *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992). *See also Dixon v. Pinal Cty.*, CV-10-325-PHX-DGC, 2011 WL 2669245, at *2 (D. Ariz. July 7, 2011) (A Defendants' inaction, standing alone, is not enough to create a triable ratification issue).

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Further, plaintiffs' *Monell* claims fail because they have no evidence demonstrating that any alleged ratification *caused* Deputy Molina to shoot Mr. Le. Municipal liability exists only where "the harm was caused in the implementation of 'official municipal policy.'" *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1951, 201 L. Ed. 2d 342 (2018). Ratification is a way to prove the existence of an official policy, but causation still must be present for a successful §1983 claim. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1075 (9th Cir. 2016) (Pointing out the need for "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation."); *Waters v. Madson*, 921 F.3d 725, 743 (8th Cir. 2019) ("There must be a causal connection between the municipal policy or custom and the alleged constitutional violation in order to state a valid claim under § 1983.").

In some limited circumstances, after-the-fact ratification provides a direct causal link to the earlier actions of a municipal employee because it continues an ongoing constitutional violation. For example, if a school superintendent fires a teacher for unconstitutional reasons and then the school board approves the firing with knowledge of the superintendent's improper purpose, it both "ratifies" the firing and perpetuates the constitutional harm through its own actions. A causal link between the ratification and the official school board action exists in this circumstance. *See Praprotnik*, 485 U.S. at 127, ("[W]hen a subordinate's decision is subject to review by the municipality's authorized policymakers, they have retained the authority to measure the official's conduct for conformance with their policies. If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final."). Ratification also overcomes causation problems when the after-the-fact ratification is evidence of the policies that constrained

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the municipal employee to take an unconstitutional action. *Id.* But neither circumstance exists in this case.

With an alleged excessive force incident, no causal link can exist between any *single* instance of ratification (or nonratification) and the shooting of Mr. Le. Unlike a school board whose actions can resolve an unconstitutional firing, the Sheriff has absolutely no power to undo the Le shooting, which by itself, completely precludes the causal connection necessary for a viable § 1983 cause of action. Similarly, there is nothing about an after-the-fact approval that evidences a policy that might have constrained Deputy Molina toward the single choice to shoot Mr. Le despite other options. Unlike ministerial municipal employees who might be constrained by official policy, later ratified, to take an unconstitutional action, the options open to a deputy in a use of force incident are myriad. Any after-the-fact approval by the Sheriff does not constrain a deputy's choice of discretionary actions, but merely approves one possible course of conduct out of nearly infinite possibilities.

Even if an elected Sheriff had ratified Deputy Molina's actions through approval of the Board's findings (which the evidence fails to support), causation for a legally sufficient §1983 claim cannot rest on this single incident. An "after-the-fact approval of the investigation" did not cause Le's death, and "a contrary holding 'would effectively make the [sheriff's office] liable on the basis of *respondeat superior*, which is specifically prohibited by *Monell*.'" *Pineda v. Hamilton Cty., Ohio*, 977 F.3d 483, 496 (6th Cir. 2020) (citation omitted). *See also Waters v. Madson*, 921 F.3d 725, 743 (8th Cir. 2019) ("Chief Wise's after-the-fact determination [as official policy maker] did not cause the alleged violations of Appellants' constitutional rights and that Appellants, therefore, cannot premise a Monell claim on Chief Wise's actions.").

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Finally, Plaintiffs cannot satisfy *Monell* by claiming inadequacies in the Board's Le investigation alone without proving other prior instances of so-called "sham investigations." Plaintiffs have abandoned any "pattern and practice claim" (*see* Dkt. 108 Pls's Opp. at 71), but "an allegation of a *single* failure to investigate a single plaintiff's claim does not suffice." *Pineda v. Hamilton Cty., Ohio*, 977 F.3d 483, 495 (6th Cir. 2020). As the Sixth Circuit explains, the requirement for proof of *multiple* failures to investigate follows from §1983's causation element:

> This requirement (that there be multiple failures to investigate) also follows from § 1983's causation element. To protect against *respondeat superior* liability, the Supreme Court has held that § 1983 imposes a "rigorous" causation standard where, as here, a plaintiff seeks to hold a local entity liable for its employee's actions. *Brown*, 520 U.S. at 405, 117 S.Ct. 1382. A plaintiff must show that the *entity's* unconstitutional custom—not just the *employee's* unconstitutional action—caused the plaintiff's injury. *Id.* at 404, 117 S.Ct. 1382. In this case's context, there must be a "link between" the local entity's failure to investigate and the plaintiff's injury. *Meirs*, 821 Fed.Appx. at 453; *see Smith v. City of Troy*, 874 F.3d 938, 947 (6th Cir. 2017). ***And an entity's failure to investigate the plaintiff's specific claim will, by definition, come after the employee's action that caused the injury about which the plaintiff complains. Because the injury will have already occurred by the time of the specific investigation, "there can be no causation" from that single failure to investigate.*** *David*, 706 F. App'x at 853. As the Eleventh Circuit noted, "a single failure to investigate an incident cannot have caused that incident." *Salvato v. Miley*, 790 F.3d 1286, 1297 (11th Cir. 2015); *cf. Ellis ex rel. Pendergrass v Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 701 n.5 (6th Cir. 2006). A series of investigative failures before the plaintiff's injury, by contrast, might at least suggest that the local entity's custom led to the employee's harmful action in the plaintiff's own case. *See Brown*, 520 U.S. at 407, 117 S.Ct. 1382.

Id. at 495 (emphasis added). Because there was no ratification by the elected Sheriff and plaintiffs have failed to pursue other avenues to satisfy *Monell*, their §1983 claims against King County must be dismissed.

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V. CONCLUSION

For the foregoing reasons, the Court should grant summary judgment and dismiss plaintiffs' claims against King County.

DATED this 11th day of February, 2021 at Seattle, Washington.

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2021, I electronically filed the foregoing document(s) with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following participants:

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I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

DATED this 11th day of February, 2021 at Bellevue, Washington.

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